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In the
Supreme Court of the United States
October Term, 1993

No. _____

DEE FARMER,

Petitioner,

v.

RICHARD HAAS, EDWARD J. BRENNAN, and L. E. DuBOIS,

Respondents.

Petition for Writ of Certiorari to
The United States Court of Appeals
for the Seventh Circuit

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QUESTION PRESENTED

Whether the Seventh Circuit erred in adopting the cause-and-prejudice standard for appointment of counsel to a *pro se* litigant in a civil case under 28 U.S.C. § 1915(d) and rejecting the universally accepted multi-factor test?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner Dee Farmer and the Respondents Richard Haas, Edward J. Brennan, and L.E. DuBois.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEE FARMER, *Petitioner,*

v.

RICHARD HAAS, EDWARD J. BRENNAN, and L.E. DUBOIS, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioner, Dee Farmer, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled proceeding on April 2, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 990 F.2d 319, and is reprinted in the appendix, p. 1a, *infra*.

The order of the United States District Court for the Western District of Wisconsin (Shabaz, D.J.) has not been reported. It is reprinted in the appendix, p. 8a, *infra*.

JURISDICTION

Invoking federal subject matter jurisdiction under 28 U.S.C. § 1331(a), the Petitioner brought this suit in the Western District of Wisconsin. On May 2, 1991 the district court denied Petitioner's request for appointment of counsel. *See* p. 8a, *infra*. Following the entry of a jury verdict, Petitioner filed a timely notice of appeal.

On Petitioner's appeal, the Seventh Circuit on April 2, 1993, entered a judgment and an opinion upholding the district court's order. *See* p. 1a, *infra*. The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

28 U.S.C. § 1915(d). Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b) In any civil or criminal case the court may, upon the filing of a like affidavit, direct that the expense of printing the record on appeal, if such printing is required by the appellate court, be paid by the United States, and the same shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend

as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

(e) Judgment may be rendered for costs at the conclusion of the suit or action as in other cases, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

STATEMENT OF THE CASE

Petitioner, Dee Farmer, a transsexual prisoner in federal custody, filed a *pro se* complaint against Respondents on May 24, 1989.[1] The complaint alleged that Respondents violated the Eighth Amendment by denying Farmer any medical treatment for her transsexualism while she was incarcerated at the Federal Correctional Institution in Oxford, Wisconsin. On September 15, 1989, Respondents moved for summary judgment, arguing that the Bureau of Prisons had provided Farmer with medical treatment by making psychotherapy available to her. The district court agreed and granted Respondent's motion on November 3, 1989. On November 6, 1989, Farmer filed her first motion for appointment of counsel, dated October 27, 1989, and on November 16, 1989, she filed a motion to reconsider the grant of summary judgment in favor of Respondents. On December 15, 1989, the district court denied Farmer's motion to reconsider and declared her motion for appointment of counsel moot.

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1 In deference to Farmer's wishes, she will be referred to with a female pronoun.

Farmer appealed the entry of summary judgment, and on March 1, 1991, the Seventh Circuit reversed and remanded. On April 29, 1991, Farmer filed a second motion for appointment of counsel. On May 2, 1991, the district court denied this second motion in a one page order. The district court listed four of the five factors identified in *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), to determine whether counsel should be appointed under 28 U.S.C. § 1915(d): the plaintiff's likelihood of success on the merits, the nature of the factual issues, the complexity of the legal issues, and the ability of the plaintiff to represent herself.[2] In two sentences, the court summarily applied three of the factors and held that appointment of counsel was not appropriate.

A two day jury trial commenced in Madison, Wisconsin on May 9, 1991, at which Farmer proceeded *pro se*, dressed as a female. After the jury returned a verdict in favor of the Respondents, the district court entered an Order of final judgment, dated May 13, 1991, in accordance with the verdict.

Farmer appealed the district court's denial of appointment of council to the Court of Appeals for the Seventh Circuit.[3] On April 2, 1992, the Seventh Circuit upheld the district court's decision not to appoint counsel. *Farmer v. Haas*, 990 F.2d 319 (7th Cir. 1993). In doing so, the court adopted a new "stripped down" test for appointment of counsel under § 1915(d). *Id.* at 322. Judge Posner, writing for the Seventh Circuit, criticized the universally accepted *Maclin* test, because "as commonly happens, the multiple factors of *Maclin v. Freake* collapse upon inspection." *Id.* at 321. Judge Posner contended that the first *Maclin* factor, whether the claim has merit, is actually a non-factor, stating "[w]ell, if the plaintiff doesn't even have a colorable claim,

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2 The district court did not mention an additional *Maclin* factor, the necessity of cross-examination to weed out conflicting testimony. *See Maclin*, 650 F.2d at 888.

3 The Seventh Circuit appointed present counsel to represent Farmer on this second appeal.

the case should be dismissed out of hand. There is no need to worry about appointment of counsel." *Id.* Judge Posner wrote that the second factor, "the plaintiff's ability to investigate the facts without the assistance of counsel . . . is actually an aspect of the third factor, the complexity of the evidence." *Id.* Additionally, according to Judge Posner, the fourth factor, the plaintiff's ability to represent herself, is not an independent factor, because it is directly dependent on the second and third factors, as well as the fifth, the difficulty of the legal issues. *Id.*

The new Seventh Circuit test asks, "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome." *Id.* at 332. The court emphasized the similarity of this test to the cause-and-prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which governs an appellate court's review of ineffective assistance of counsel cases, stating that "[t]he resemblance . . . is not an accident." *Farmer*, 990 F.2d at 332. Judge Posner continued, "a prisoner who argues that a lawyer should have been requested to represent him is arguing that he could not represent himself effectively." *Id.* Applying this cause-and-prejudice standard, the court held that the district court's decision to deny appointment of counsel was not an abuse of discretion. *Id.*

REASONS FOR GRANTING THE WRIT

The Seventh Circuit has abandoned the universally accepted multi-factor test for appointment of counsel to indigent litigants in civil cases under 28 U.S.C. § 1915(d) and has instead adopted a cause-and-prejudice standard. Because the cause-and-prejudice standard is designed for retrospective review of a fully developed record, the standard is insufficient to determine whether appointment of counsel is appropriate for an indigent civil litigant in advance of trial. Furthermore, the cause-and-prejudice standard creates a strong presumption against appointment of counsel, which directly contravenes Congress' stated intent to improve access to the courts for poor people. *See* Open-

ing United States Courts to Certain American Citizens, H.R. REP. No. 1079, 52nd Cong., 1st Sess. (1892) [hereinafter H.R. REP. No. 1079]. To resolve the split in the circuits, created by the Seventh Circuit, on the appropriate standard for appointment of counsel under § 1915(d), this Court should grant this petition for certiorari, pursuant to Supreme Court Rule 17.1(a).

Section 1915(d) provides that "[t]he court may request an attorney to represent any [person claiming *in forma pauperis* status] unable to employ counsel and may dismiss the case if the allegation is untrue, or if satisfied that the action is frivolous or malicious."[4] Before the Seventh Circuit's opinion in this case, all circuits had adopted a multi-factor test for appointment of counsel, as first articulated in *Maclin*, 650 F.2d at 887-88.[5] The

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4 The Court has visited other issues concerning § 1915 in recent years. In *Mallard v. United States Dist. Ct.*, 490 U.S. 296 (1989), the Court held that a district court may request, but not require, an attorney to represent a litigant under § 1915(d). In *Neitzke v. Williams*, 490 U.S. 319 (1989), the Court held that federal courts may dismiss claims pursuant to § 1915(d) if satisfied that the action is frivolous or malicious. Last term, the Court held that only a natural person may proceed *in forma pauperis* under § 1915. *Rowland v. California Men's Colony*, __U.S.__, 113 S. Ct. 716 (1993).

5 *See, e.g., Swofford v. Mandrell*, 969 F.2d 547, 551 (7th Cir. 1992) (citing *Maclin* and applying multi-factor test); *Long v. Shillinger*, 927 F.2d 525, 527 (10th Cir. 1991) (citing *Maclin* and applying multi-factor test); *Holt v. Ford*, 862 F.2d 850, 853 (11th Cir. 1989) (citing *Maclin* and applying multi-factor test); *Cookish v. Cunningham*, 787 F.2d 1, 3 (1st Cir. 1986) (citing *Maclin* and applying multi-factor test); *Hodge v. Police Officers*, 802 F.2d 58, 60-61 (2nd Cir. 1986) (citing *Maclin* and applying multi-factor test); *In re Lane*, 801 F.2d 1040, 1044 (8th Cir. 1986) (citing *Maclin* and applying multi-factor test); *Jackson v. Dallas Police Dept.*, 811 F.2d 260, 261-62 (5th Cir. 1986) (applying multi-factor test similar to *Maclin*); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984) (applying multi-factor test similar to *Maclin*); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) (applying multi-factor test similar to *Maclin*).

most commonly used factors are: (1) the merits of the indigent litigant's claim; (2) the nature of the factual issues raised in the claim (i.e., the litigant's ability to investigate); (3) the necessity for cross-examination to resolve conflicting testimony; (4) the capability of the indigent litigant to present the case; and (5) the complexity of the legal issues raised by the complaint. The *Maclin* court stated that these factors, while relevant in the case before it, were "by no means an exclusive checklist." *Id.* at 889.[6]

The use of a multi-factor test is indispensable to a just determination regarding appointment of counsel under § 1915(d). The *Maclin* test addresses most obstacles an indigent would normally encounter during litigation, yet is flexible enough to allow a court to consider other factors that may be important in a specific case. The requirement that a trial court apply a multi-factor test also ensures that the district court will carefully consider whether to request counsel for the litigant. *See, e.g., Swofford v. Mandrell*, 969 F.2d 547, 551-52 (7th Cir. 1992) (reversing denial of appointment where district court applied only two *Maclin* factors). Moreover, the recitation and evaluation of the factors aids an appellate court's review of the lower court's decision for abuse of discretion. *See Jackson v. Dallas Police Dept.*, 811 F.2d 260, 262 (5th Cir. 1986).

Judge Posner's criticism of the *Maclin* test is unconvincing. Judge Posner criticizes the first factor, which looks at the merits of the litigant's claim, stating "if the plaintiff doesn't even have a colorable claim, the case should be dismissed out of hand. There is no need to worry about counsel." *Farmer*, 990 F.2d at 321. To the contrary, a colorable claim is a threshold requirement for appointment of counsel implicit in § 1915(d), which permits the dismissal of "frivolous" or "malicious" claims. *See Neitzke v. Williams*, 490 U.S. at 324. Moreover, a district court will be

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6 Prior to the Seventh Circuit's decision in *Maclin*, Justices Blackmun, Brennan and Marshall dissented from a denial of certiorari concerning the appropriate standard for appointment of counsel under § 1915(d). *Hyman v. Rickman*, 446 U.S. 989 (1980) (J. Blackmun, dissenting).

more inclined to appoint counsel when the claim is meritorious. *See, e.g., Maclin*, 650 F.2d at 887.

Judge Posner also stated that the second factor, the ability of the litigant to investigate the facts, is merely a part of his third factor, which he termed "the complexity of the evidence." *Farmer*, 990 F.2d at 321.[7] The ability to investigate, however, is concerned with the physical ability of the litigant to access facts essential to her case. This factor is distinct from a litigant's ability to understand these facts. Even though the facts of a case may be relatively simple, the litigant may be unable to prepare for trial if she does not have access to documents or witnesses. For example, in this case, the only "expert" Farmer could contact in the two months between reversal by the Seventh Circuit and trial was a transsexual nun living in California, whose deposition was read to the jury.

Similarly, the fourth factor, the ability of the litigant to present the claim, is conceptually distinct from the other factors. A litigant may be able to investigate and understand the facts and grasp the legal issues, yet still be unable to prepare and present the case. For example, an illiterate litigant may pass factors 2, 3, and 5 yet be unable to prepare and present the case, because she is unable to read the pleadings and examine exhibits.

Although Judge Posner claims that circuit courts have been split concerning the standard for appointment of counsel, the only split that exists is between this case and all others, which apply a version of the multi-factor *Maclin* test.[8] Judge Posner adopted

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7 Judge Posner's list of factors is different than those used in *Maclin*. In *Maclin*, the court listed the necessity of cross-examination as the third factor. *Maclin*, 650 F.2d at 888.

8 Judge Posner claims that several circuits use what amounts to a cause-and-prejudice standard. *See Farmer*, 990 F.2d at 322 (citing *Terrell v. Brewer*, 935 F.2d 1015 (9th Cir. 1991); *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984); *Branch v. Cole*, 686 F.2d 265 (5th Cir. 1982)). These cases, and others, state that the applicable standard for

a "stripped down" cause-and-prejudice standard for a district court's determination of whether to appoint counsel. *Id.* at 322. Judge Posner wrote that "the necessary inquiry is simpler than *Maclin's* multi-factorial approach implies: given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome? The resemblance to the performance and prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which governs the issue of ineffective assistance of counsel in criminal cases, is not an accident." *Farmer*, 990 F.2d at 322.

This cause-and-prejudice standard is inappropriate for use in § 1915(d) determinations. First, the cause-and-prejudice standard is designed to look back on a fully developed record. This type of "thumbs up — thumbs down" test is inappropriate for a trial court's prospective determination, based on an undeveloped record, of whether counsel will be appropriate in a *pro se* civil case. Such a determination would amount to speculation by the district court and would be effectively unreviewable on appeal.

Second, the rationale behind the cause-and-prejudice standard is inapposite to the issues confronting a district court in appointing counsel for indigent litigants under § 1915(d). Chief Justice Rehnquist, in *Wainwright v. Sykes*, 433 U.S. 72 (1977), identified four reasons for implementing the cause-and-prejudice standard in habeas proceedings: finality, comity, judicial economy, and routing claims into the most appropriate forum. *Id.* at 81-83, 88-90. None of these reasons apply to a trial court's decision to appoint counsel under § 1915(d).

Similarly, the rationale for using the cause-and-prejudice standard in ineffective assistance of counsel cases does not apply. In *Strickland v. Washington*, 466 U.S. 668 (1984), Justice O'Connor explained the rationale for using the standard in such cases.

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appointment of counsel is the "exceptional circumstances" test. While this standard is different in name, the substance is the same as the *Maclin* test. *See Hodge v. Police Officers*, 802 F.2d at 61.

First, the harshness of the standard deters against second guessing trial counsel. Second, the cause-and-prejudice standard discourages litigants from trying to "take a second bite from the apple." *Id.* at 689-90. Moreover, in *Hill v. Lockhart*, 474 U.S. 52 (1985), Chief Justice Rehnquist added that, as in habeas proceedings, applying the cause-and-prejudice standard reinforces the finality of the initial trial. *Id.* at 58. These concerns do not apply to a trial court's determination under § 1915(d).

Because of these concerns, the cause-and-prejudice standard is designed to create a strong presumption against a finding of ineffective assistance in a criminal proceeding and in favor of procedural default in a habeas case. This harsh presumption is inappropriate to determine whether appointment of counsel is proper in the civil context, particularly given Congress' strong intent to provide legal assistance to indigent litigants. *See* H.R. REP. NO. 1079.

CONCLUSION

The Seventh Circuit has created an inappropriate standard for the appointment of counsel to a *pro se* litigant under § 1915(d). The cause-and-prejudice standard should not be applied prospectively to an undeveloped record, and the rationale for using the standard makes no sense in relation to a trial judge's decision to appoint counsel. The multi-factor *Maclin* test has worked well, and therefore review by this Court is critical.

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APPENDIX

In the United States Court of Appeals for the Seventh Circuit

No. 91-2484
DEE FARMER,

Plaintiff-Appellant,

v.

RICHARD HAAS,
EDWARD J. BRENNAN
AND L.E. DUBOIS,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.

No. 89 C 524—John C. Shabaz, Judge.

ARGUED MARCH 3, 1993—DECIDED APRIL 2, 1993

Before POSNER and EASTERBROOK, *Circuit Judges*, and PELL, *Senior Circuit Judge*.

POSNER, *Circuit Judge*. Dee Farmer, a federal prison inmate, brought this suit for damages against three members of the prison staff, charging deliberate indifference (in violation of the cruel and unusual punishments clause of the Eighth Amendment) to her need for medical and psychiatric treatment for the condition known as transsexualism (gender dysphoria). After this court in an unpublished order reversed the grant of summary judgment for the defendants, the case was tried for two days before a jury,

which brought in a verdict for the defendants, precipitating this appeal.

Farmer, who is now 27 years old, is serving a long sentence for participation in an elaborate credit card fraud. She (the defendants say "he," but Farmer prefers the female pronoun and we shall respect her preference) is a transsexual. A transsexual is a person who considers himself to be of the male gender although he has the female sexual organs, or, more commonly, as in Farmer's case, considers herself to be of the female gender but has the male sexual organs. The disjunction between sexual identity and sexual organs is a source of acute psychological suffering that can, in some cases anyway, be cured or at least alleviated by sex reassignment—the complex of procedures loosely referred to as "a sex-change operation." Anne Bolin, *In Search of Eve: Transsexual Rites of Passage* (1988); Erwin K. Koranyi, *Transsexuality in the Male: The Spectrum of Gender Dysphoria* (1980); American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* §302.50 (3d ed. 1987); "Transsexualism," in American Medical Association, *Encyclopedia of Medicine* 1006 (Charles B. Clayman ed. 1989). There is a nascent jurisprudence of transsexualism, illustrated by Americans With Disabilities Act, 42 U.S.C. §12211(b)(1); *Meriwether v. Faulkner*, 821 F.2d 408 (7th Cir. 1987); *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984); *White v. Farrier*, 849 F.2d 322 (8th Cir. 1988); *Supre v. Ricketts*, 792 F.2d 958 (10th Cir. 1986); *Phillips v. Michigan Dept. of Corrections*, 731 F. Supp. 792 (W.D. Mich. 1990), aff'd without opinion, 932 F.2d 969 (6th Cir. 1991); *Crosby v. Reynolds*, 763 F. Supp. 666 (D. Me. 1991), and *Doe v. McConn*, 489 F. Supp. 76 (S.D. Tex. 1980).

Beginning at the age of 14, Farmer underwent estrogen therapy. Silicone breast implants followed. The usual next step would have been an operation to remove the male sexual organs and create, from penile tissue, a simulacrum of a vagina. However, for reasons that are unclear Farmer did not have the operation—at least not one performed by a surgeon. Farmer did have what the briefs call a "black market" operation to remove her

testicles, but, odd as it may seem, the operation was unsuccessful. Yet, while retaining the male sexual organs, Farmer lived as a woman for five years before being imprisoned. The practice of the federal prison authorities, we were told at argument, is to incarcerate persons who have completed sexual reassignment with prisoners of the transsexual's new gender, but to incarcerate persons who have not completed it with prisoners of the transsexual's original gender. So Farmer was put in with male prisoners—but without incident, in happy contrast to *Meriwether v. Faulkner, supra*. At the trial, Farmer wore women's clothing.

Farmer claims that the defendants refused her repeated requests for medical and psychiatric treatment. Eventually she was transferred to another prison, where she is receiving psychiatric treatment. For reasons that are unclear, she has been advised against continuing with estrogen therapy; and her male organs have yet to be removed. The issue in the trial was the denial of any treatment, not of some specific treatment, for Farmer's condition. She relied heavily at trial on written requests for treatment that were found in the defendants' files; the defendants countered with evidence that the requests were forgeries. Farmer called as an expert witness a nun to explain to the jury the emotional harm that a transsexual could suffer if denied medical or psychiatric assistance. The defendants did not and do not deny that transsexualism is not a frivolous "life style" choice but a genuine psychiatric disorder for which a prisoner is entitled to receive medical or psychiatric treatment.

The only question raised by the appeal is whether the district judge should have granted Farmer's motion to request a lawyer to represent her at the trial. 28 U.S.C. §1915(d). Had the motion been made after *Jackson v. County of Maclean* [sic], 953 F.2d 1070, 1072-73 (7th Cir. 1992), the judge would have been required to deny it out of hand unless Farmer had made some effort to secure a lawyer in the private market. Her suit sought damages, and if it had merit she might be able to retain a tort lawyer to handle it on a contingent basis. That would be a preferable course to a judge's twisting some lawyer's arm to induce

him to take a case that he would rather not take. If the plaintiff were unable to secure a lawyer in the private market, this might mean the suit had no merit, although alternatively it might mean that the plaintiff lacked the necessary information to obtain a suitable lawyer.

Jackson establishes a sensible threshold requirement, but one inapplicable here because Farmer could not know that it *was* a requirement, so no significance can be attached to her failure to seek (for all we know she *did* seek) private counsel. *Id.* at 1073. It is true that the statute itself confines the power of request to cases in which the litigant is "unable to employ counsel" and that the Second Circuit had, long before *Jackson*, interpreted this to mean that the litigant must show that he tried and failed to find a lawyer on his own. *Hodge v. Police Officers*, 802 F.2d 58, 61 (2d Cir. 1986). See also *In re Lane*, 801 F.2d 1040, 1043 (8th Cir. 1986). Until *Jackson*, however, our court had assumed that "unable to employ counsel" meant indigent, though an indigent might be able to obtain a lawyer on a contingent-fee basis if he had a substantial claim for money damages.

So the parties, disregarding *Jackson*, have argued the pros and cons of Farmer's request for counsel under the five-fold test that a panel of this court adopted in *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981)(per curiam). Since *Maclin* was decided, however, we have become more wary about multifactor tests, see, e.g., *Prussner v. United States*, 896 F.2d 218, 224 (7th Cir. 1990) (en banc); *Kenosha Liquor Co. v. Heublein, Inc.*, 895 F.2d 418, 419 (7th Cir. 1990); *Stevens v. Tillman*, 855 F.2d 394, 399 (7th Cir. 1988), and, as commonly happens, the multiple factors of *Maclin v. Freake* collapse upon inspection. The first factor is whether the plaintiff's claim for relief has some merit—is "colorable," as lawyers like to say. Well, if the plaintiff doesn't even have a colorable claim, the case should be dismissed out of hand. There is no need to worry about counsel. The second factor is the plaintiff's ability to investigate the facts without the assistance of counsel and is actually an aspect of the third factor, the complexity of the evidence. Evidence must be obtained, and it must

be presented. The fourth factor is the plaintiff's ability to represent himself and the fifth the difficulty of the legal issues. Obviously the fourth factor is dependent on the second and third (which are different stages of the same procedure), and also on the fifth because capabilities are relative to some task. The simpler the case, the less intelligent or experienced the plaintiff need be to handle it without the assistance of counsel.

Jackson shows that the *Maclin* test is not canonical, while the discussion in the preceding paragraphs shows that the necessary inquiry is simpler than *Maclin's* multifactorial approach implies: given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome? The resemblance to the performance and prejudice standard of *Strickland v. Washington*, 466 U.S. 668 (1984), which governs the issue of ineffective assistance of counsel in criminal cases, is not an accident. In effect, a prisoner who argues that a lawyer should have been requested to represent him is arguing that he could not represent himself effectively. Although *Maclin v. Freake* has been cited approvingly by many courts, see, e.g., *Hodge v. Police Officers*, *supra*, 802 F.2d at 61, and adopted by the Tenth Circuit, *Long v. Shillinger*, 927 F.2d 525, 527 (10th Cir. 1991), most courts prefer a simpler formulation similar to that suggested above. Illustrative is *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991), where the court confined the exercise of the requesting power of cases presenting "exceptional circumstances" as determined by "an evaluation of both 'the likelihood of success on the merits and ability of the Petitioner to articulate his claims *pro se* in light of the complexity of the legal issues involved.'" See also *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Branch v. Cole*, 686 F.2d 265, 266 (5th Cir. 1982)(per curiam).

We asked "did the plaintiff *appear* to be competent to try it himself" in our stripped-down alternative to the *Maclin* test because the judgment must be made by the district judge before trial. If the judgment was sensible when made, the fact that after the trial it is apparent that the plaintiff was not competent to try

the case after all will not establish error. *McCarthy v. Weinberg*, 753 F.2d 836, 838 (10th Cir. 1985) (per curiam). Error is relative to what the judge reasonably could have known at the time he had to make his ruling. *Eads v. Secretary of Health & Human Services*, 983 F.2d 815, 817 (7th Cir. 1993). Because of the particularistic character of the ruling and the fact that the district judge has the considerable advantage over us of having seen how the plaintiff handled herself in the pretrial proceedings, our review of the judge's decision not to request a lawyer for the plaintiff is deferential. We ask not whether he was right, but whether he was reasonable.

We cannot say that the judge was unreasonable here. When Farmer moved for counsel in April 1991, a week before trial, she had been litigating since February 1988 and had prosecuted a successful appeal to this court. The trial itself promised to be a straightforward swearing contest, the only issue being whether Farmer had or had not requested treatment. There were no legal issues and none of those "pitfalls that confront laymen in dealing with non-intuitive procedural requirements applied in a setting of complex legal doctrine" that led us to reverse a district judge's refusal to request a lawyer for a prisoner plaintiff in *Hughes v. Joliet Correctional Center*, 931 F.2d 425, 429 (7th Cir. 1991). Farmer argues that she needed a lawyer to procure a better qualified expert witness on transsexualism than a nun. But such an expert would have been relevant only to the assessment of damages, and the case never got that far. No doubt the main reason Farmer wanted an expert witness on transsexualism was to persuade the jury that it is a recognized medical disorder—that her request for treatment, therefore, was not a frivolous one. But the defendants had agreed that she was entitled to treatment, and Farmer does not argue that the judge failed to instruct the jury adequately on its duty to consider the issue of Farmer's alleged requests in the same light as if she were a diabetic or an amputee rather than a transsexual somehow arrested midway in the process of conversion from one gender to the other and desperately in need of some kind of medical or psychiatric treatment.

Besides being an experienced litigator, Farmer has a history of fraud, arguing the possession of an intelligence superior to that of a criminal who relies on brawn rather than brains. The transcript of the trial discloses a shrewd cross-examination by Farmer of one of the defendants on the issue of forgery, bringing out all the contradictions and implausibilities in that defendant's testimony. It is true, as her appointed counsel in this court points out, that Farmer had difficulty coping with the objections that the defendants' counsel made to her direct testimony. But her counsel has made no effort to show that the objections were groundless, so that the presence of a lawyer to contest the objections would have made a difference. No doubt a good lawyer would have done better than Farmer, and might have won; but if this were the test, district judges would be required to request counsel for every indigent litigant. There is no constitutional or for that matter statutory right to counsel in federal civil cases—only a statute that authorizes the district judge to request, but not to compel, *Mallard v. United States District Court*, 490 U.S. 296 (1989); *Jackson v. County of Maclean, supra*, 953 F.2d at 1071, a lawyer to represent an indigent civil litigant. The statute confides the matter to the district judge's discretion, which we shall override only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer and he could not procure a lawyer on his own. *Id.* at 1072; *Swofford v. Mandrell*, 969 F.2d 547, 551 (7th Cir. 1992); *McNeil v. Lowney*, 831 F.2d 1368 1371 (7th Cir. 1987). That exacting standard is not satisfied in this case.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of
Appeals for the Seventh Circuit

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

DEE FARMER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	ORDER
	)	
DR. HAAS,	)	
EDWARD BRENNAN	)	89-C-524-S
and L.E. DUBOIS,	)	
	)	
Defendants.	)	

The above entitled matter is scheduled for jury selection and trial on May 6 and 9, 1991 respectively. On April 29, 1991 plaintiff filed a motion for appointment of counsel.

In *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), the Court held that certain factors should be considered before appointing counsel. These factors include the plaintiff's likelihood of success on the merits, the nature of the factual issues, the complexity of the legal issues and the ability of the plaintiff to represent himself or herself.

This case is neither factually difficult nor legally complex. Plaintiff has represented herself throughout these proceedings and is capable to continue in further proceedings in this court. Therefore her motion for appointment of counsel must be denied.

Plaintiff indicates in her motion that she has not received the defendants' pretrial report. Defendants' counsel is directed to forthwith serve plaintiff who is now in the Dane County Jail with a copy of the report.

ORDER

IT IS ORDERED that plaintiff's motion for appointment of counsel is DENIED.

IT IS FURTHER ORDERED that plaintiff shall be served with a copy of defendants' pretrial report forthwith.

Entered this 2nd day of May, 1991.

BY THE COURT:

JOHN C. SHABAZ
District Judge

Supreme Court, U.S.
FILED
OCT 13 1993
OFFICE OF THE CLERK

No. 93-38

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1993

DEE FARMER, PETITIONER

v.

RICHARD HAAS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion under 28 U.S.C. 1915(d) in not requesting an attorney to represent petitioner in her civil suit.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 990 F.2d 319. The order of the district court (Pet. App. 8a-9a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1993. The petition for a writ of certiorari was filed on July 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a federal prison inmate who has been convicted of participating in an elaborate credit card fraud. She filed a *pro se* lawsuit in the United

States District Court for the Western District of Wisconsin seeking damages from three prison staff members, respondents herein. The lawsuit alleged that respondents had been deliberately indifferent to her need for medical and psychiatric treatment for transsexualism, in violation of the Cruel and Unusual Punishments Clause of the Eighth Amendment. Pet. App. 1a-2a.

The district court granted respondents' motion for summary judgment on the ground that the Bureau of Prisons had provided petitioner with psychotherapy. Petitioner appealed, and the court of appeals reversed in an unpublished order and remanded the case for trial. Pet. App. 1a.

2. In April 1991, one week before trial, petitioner filed a motion for appointment of counsel pursuant to 28 U.S.C. 1915(d). Relying on the multi-factor test of *Maclin* v. *Freake*, 650 F.2d 885 (7th Cir. 1981), the district court denied the motion. Pet. App. 8a-9a. The court explained that the "case is neither factually difficult nor legally complex" and that petitioner had "represented herself throughout these proceedings and is capable to continue in further proceedings in this court." *Id.* at 8a.

At trial, the issue was whether petitioner had been denied any treatment for her condition. Petitioner claimed that respondents had refused her requests for medical and psychiatric treatment, and introduced into evidence written requests for treatment that had been found in respondents' files. Respondents introduced evidence to show that the purported written requests for treatment were forgeries and that petitioner had been in a position to place forged documents in her file. Gov't C.A. Br. 7; Pet. App. 3a.

The jury returned a verdict in favor of respondents. *Id.* at 1a-2a.

3. Petitioner appealed, claiming that the district court erred in denying her motion for appointment of counsel under 28 U.S.C. 1915(d). The court of appeals affirmed. Pet. App. 1a-7a. The court noted that the parties had focused their arguments on *Maclin* v. *Freake*, *supra*, which set forth a list of five factors to be considered in determining whether to grant an indigent litigant's request for counsel under Section 1915(d). Pet. App. 4a-5a. The court concluded, however, that the factors set forth in *Maclin* "collapse upon inspection." *Id.* at 4a. Instead, the court held that the necessary inquiry is simpler than *Maclin*'s multi-factoral approach implies: "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?" *Id.* at 5a. The court of appeals observed that the resemblance of this test to the "performance and prejudice" standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984), "is not an accident," because "[i]n effect, a prisoner who argues that a lawyer should have been requested to represent him is arguing that he could not represent himself effectively." Pet. App. 5a. The court also noted that, while *Maclin* has been cited approvingly by some courts, "most courts prefer a simpler formulation." Pet. App. 5a, citing *Terrell* v. *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); *Whisenant* v. *Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); and *Branch* v. *Cole*, 686 F.2d 264, 266 (5th Cir. 1982) (per curiam).

In reviewing the district court's denial of petitioner's request for appointment of counsel in this

case,[1] the court of appeals concluded that the district court had acted reasonably. Pet. App. 5a-7a. The court noted that petitioner's motion for counsel was filed more than three years after the litigation began, during which time petitioner had already prosecuted a successful appeal. *Id.* at 6a. Moreover, the trial "promised to be a straightforward swearing contest, the only issue being whether [petitioner] had or had not requested treatment." *Ibid.*

The court found unpersuasive petitioner's claim that appointed counsel was necessary in order to

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[1] The opinion of the court of appeals is not entirely clear regarding the distinction between (1) the test that a *district court* should use, *prior to trial*, in considering an indigent plaintiff's request for counsel, and (2) the test that the *court of appeals* will itself use *after trial* in reviewing a district court's denial of a request for counsel. Properly read, the opinion assigns to the district court the task of deciding whether the plaintiff appears competent to try the case himself in view of its expected difficulty. Once the district court has made this predictive decision, the court of appeals will review it as a matter confided to the "district judge's discretion," which the court of appeals will "override only in that extreme case in which it should have been plain beyond doubt before the trial began that the difficulty of the issues relative to the capabilities of the litigant would make it impossible for him to obtain any sort of justice without the aid of a lawyer." Pet. App. 7a. The court of appeals' decision in this case thus both simplifies the district court's required pre-trial inquiry (replacing the *Maclin* "multifactoral approach" (*id.* at 5a) with "our stripped down alternative" (*ibid.*)) while applying an extremely deferential standard of appellate review to such pre-trial decisions. With regard to the limited scope of appellate review, the court specifically observed that "[i]f the [trial court's] judgment was sensible when made, the fact that after the trial it is apparent that the plaintiff was not competent to try the case after all will not establish error." *Id.* at 5a-6a.

permit her to obtain a more qualified expert witness. The court reasoned that such an expert "would have been relevant only to the assessment of damages," an issue that was irrelevant in light of the jury's finding on liability. Pet. App. 6a. Moreover, while petitioner may have desired to use such an expert to demonstrate that she was entitled to treatment for her medical condition, petitioner had no need to litigate that issue because respondents had conceded that she was entitled to treatment. *Ibid.* The court of appeals also noted that petitioner is an experienced litigator who has demonstrated intelligence through her "history of fraud" and her "shrewd cross-examination * * * of one of the defendants on the issue of forgery, bringing out all the contradictions and implausibilities in that defendant's testimony." Pet. App. 7a.

ARGUMENT

1. Petitioner contends (Pet. 5) that the court of appeals has "abandoned the universally accepted" test articulated in *Maclin* in favor of a "cause and prejudice" standard for guiding trial court determinations of whether to grant requests for appointed counsel under Section 1915(d).[2] The formulation adopted for

[2] Petitioner characterizes the court of appeals' test as requiring a showing of "cause and prejudice" before counsel will be appointed under Section 1915(d). This characterization is inaccurate. The court of appeals' test is, in fact, analytically distinct from the "cause and prejudice" standard applied in the habeas corpus context. See, *e.g.*, *McCleskey* v. *Zant*, 111 S. Ct. 1454 (1991); *Coleman* v. *Thompson*, 111 S. Ct. 2546 (1991); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). In the habeas corpus context, "cause" refers to the requirement that a habeas petitioner show some justification for his failure to comply with the particular procedural rule that is being urged as a bar to his claim. That requirement has no analog in this case. Rather, as

district court use in this case, however, is fully consistent with *Maclin* and is nothing more than a simplified restatement of the *Maclin* approach. Pet. App. 5a.

Maclin set forth a list of factors that should generally be considered by district courts presented with a request for appointment of counsel under Section 1915(d). Those factors were: (1) the merits of the indigent litigant's case; (2) the indigent litigant's ability to investigate crucial facts; (3) the complexity of the factual issues and the need for cross-examination by an attorney; (4) the indigent litigant's ability to present the case; and (5) the complexity of the legal issues. 650 F.2d at 887-889.

As the court of appeals observed (Pet. App. 4a-5a), there is substantial overlap among the various *Maclin* factors. Accordingly, the court here articulated a simpler, more straightforward formulation: "given the difficulty of the case, did the plaintiff appear to be competent to try it himself and, if not, would the presence of counsel have made a difference in the outcome?" Pet. App. 5a. While that formulation uses language different from that used in *Maclin*, it does not amount to a meaningfully different legal standard; all of the factors set forth in *Maclin* are relevant to, and thus subsumed in, the test formulated by the court of appeals.

That the court of appeals' test does not conflict with *Maclin* is demonstrated by the fact that, in

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the court of appeals observed, its approach here resembles "the *performance* and prejudice standard of *Strickland* v. *Washington*, 466 U.S. 668 (1984), which governs the issue of ineffective assistance of counsel in criminal cases." Pet. App. 5a (emphasis added).

considering whether the district court had abused its discretion, the court of appeals examined essentially the same factors that *Maclin* identified as relevant to a Section 1915(d) inquiry. Thus, the court considered whether petitioner's ability to present necessary evidence (specifically, expert testimony) had been affected by the absence of appointed counsel; whether the case was factually or legally complex; whether petitioner had the ability to conduct effective cross-examination; and whether petitioner possessed the ability to present her case adequately. Pet. App. 6a-7a. Petitioner points to no respect in which adherence to *Maclin*'s verbal formulation would have resulted in a different level or scope of appellate review in this case, and thus there is no conflict.

2. For the same reasons, petitioner also errs in contending (Pet. 6, 8) that the court of appeals' decision creates a conflict with other circuits that have adopted some version of the *Maclin* test. As noted above, the court of appeals' test in fact subsumes the *Maclin* factors, and thus is entirely consistent with those cases adopting the *Maclin* approach.

3. As the court of appeals observed (Pet. 5a), its test is also fully consistent with those circuits that ask trial courts to apply an "exceptional circumstances" standard to requests for appointment of counsel under Section 1915(d). Under that standard, the existence of "exceptional circumstances" is determined by "an evaluation of both 'the likelihood of success on the merits and the ability of the [indigent litigant] to articulate his claims *pro se* in light of the complexity of the legal issues involved.'" *Terrell* v. *Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991); see also *Branch* v. *Cole*, 686 F.2d 264, 266 (5th Cir. 1982);

Whisenant v. *Yuam*, 739 F.2d 160, 163 (4th Cir. 1984). The approach followed by the court below likewise asks whether, "given the difficulty of the case, * * * the plaintiff appear[s] to be competent to try [the case] himself and, if not, would the presence of counsel have made a difference in the outcome?" Pet. App. 5a. Petitioner can point to no meaningful difference between those two standards, each of which looks to the difficulty and merits of the case and the ability of the indigent litigant.[3] Accordingly, there is no conflict among the circuits on the legal issue presented in this case, and further review is not warranted.[4]

[3] Indeed, petitioner concedes (Pet. 8-9 n.8) that the "exceptional circumstances" test is the substantive equivalent of the approach suggested in *Maclin*.

[4] This Court recently granted a petition for a writ of certiorari filed by petitioner in another case, *Farmer* v. *Brennan*, cert. granted, No. 92-7247 (Oct. 4, 1993). There is no reason to hold the petition in this case pending resolution of that case, which involves the unrelated question of the proper standard for determining whether prison officials have been deliberately indifferent to the safety of prisoners in violation of the Eighth Amendment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1993